
United States *Vol. 1923*
Circuit Court of Appeals

For the Ninth Circuit.

CHARLES DEMMERT, for himself and all other
taxpayers similarly situated,

Appellant,

vs.

WALSTEIN G. SMITH, as Territorial Treasurer
of the Territory of Alaska,

Appellee.


Transcript of Record

Upon Appeal from the United States District Court for the
Territory of Alaska, Division Number One,
at Juneau.

FILED

APR 19 1935

PAUL P. BURNIEN,
CLERK



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No. 7781

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

WILLIAM L. PAUL, Esq.,
Juneau, Alaska,

Attorney for Appellant.

JAMES S. TRUITT, Esq.,
Juneau, Alaska,

Attorney for Appellee.

In the District Court for the Territory of Alaska,
Division Number One, At Juneau.

No. 3618 A

CHARLES DEMMERT, for himself and for all
other taxpayers similarly situated.

Plaintiff.

vs.

WALSTEIN G. SMITH, as Territorial Treasurer
of the Territory of Alaska.

Defendant.

AMENDED COMPLAINT

Comes now the plaintiff above named, for himself and for all taxpayers similarly situated in Alaska, and complains of the defendant above named as Territorial Treasurer of the Territory of Alaska, and for cause of action against the defendant as such, alleges:

I.

That at all times mentioned in this complaint and for more than ten years last past this plaintiff was and now is a citizen of the United States, and a resident of the Territory of Alaska, and for more than five years last past was and now is a taxpayer in said Territory of Alaska; that he is the owner of real and personal property within the Territory of Alaska, a taxpayer thereon, and for more than five years has and now pays taxes to the Territory of Alaska for general Territorial purposes and uses.

II.

That at all the times in this complaint mentioned Walstein G. Smith, defendant, was and now is the duly elected, qualified and acting Treasurer of the Territory of Alaska, and as such was and is the lawful custodian of all public monies raised therein by general taxation and by license taxes for public Territorial use, and was at all such times and now is in possession of all the sums of public monies hereinafter mentioned at the time of passage and approval of the special appropriation bill passed by the Legislature of Alaska, and [1]* approved by the Governor of the Territory of Alaska on the 4th day of May, 1933; that it was at all such times and now is part of his duty and power to pay out said public funds and monies belonging to said Territory in payment of all lawful and legally enacted appropriation bills so enacted by said Legislature of Alaska so lawfully and legally approved by the Governor of Alaska upon warrants drawn upon the Treasurer by such officers as shall be lawfully authorized so to do by law and not otherwise.

III.

That on the sixth day of March, 1933, the Legislature of Alaska convened at Juneau, Alaska, in regular session under the terms of the Act of Congress entitled "An act to create a legislative power thereon, and for other purposes," approved by the President of the United States on August 24, 1912.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

(27 Stat. L. 512), and on or about the 4th day of May, 1933, passed and on the 4th day of May, 1933, the Governor of Alaska approved an act of said Legislature entitled "An act for the purpose of aiding, as far as the Territory is financially able, in providing relief and work relief for persons affected by the conditions set forth in Senate Bill No. 128 (Chapter 115, Session Laws of Alaska, 1933), for the biennium ending March 31, 1935, and declaring an emergency," thereby making certain special appropriations for the support of the Territorial government of the Territory of Alaska, as therein set out and specified for the periods therein mentioned; and that the said Legislature of Alaska included in said appropriation bill and thereby attempted to appropriate to the uses therein mentioned the following items in the words and figures as follows:

1) **FOR DEPENDENT CHILDREN**

Care of Dependent Children including allowances to mothers and other incidental expenses	\$90,000.00
	[2]

2) **ALLOWANCE FOR CERTAIN AGED RESIDENTS**

Allowances for certain aged residents of Alaska as provided by law	\$185,000.00
--	--------------

3) **FOR RELIEF OF DESTITUTION**

Relief of Destitution as provided by Article III of Chapter 65, Session Laws of Alaska, 1929	\$20,000.00
--	-------------

4) FURTHER RELIEF OF THE NEEDY
AND INDIGENT

Relief of the Needy and Indigent as
provided by Article IV of Chapter 65,
Session Laws of Alaska, 1929 \$45,000.00

That the specific purpose of said appropriation bill and conditions for the distribution of said monies are more fully set out in Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933.

IV.

That the said Acts of the Legislature of the Territory of Alaska, as to the items above set forth in the foregoing paragraph of this complaint, and as to the above mentioned Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were and are ultra vires and not within the legislative power of the said Legislature to enact; and the said items and Chapter 65, Session laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were so attempted to be enacted into the law by the said Legislature without legislative power so to do and in violation of the provisions of the existing laws of the United States of America passed by the Congress thereof, prior to the passage of said appropriation act by the Legislature on the 4th day of May, 1933, and Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, and in violation of Title 8, Sections

41 and 42, United States Code, in that the said laws of Alaska discriminate against Indian citizens of the United States, otherwise qualified, in the following words:

“Section 26. Whenever it appears to the Governor, by clear and convincing evidence, that the mother of any child under sixteen (16) years of age (except [3] native children who are eligible for provision by the Department of Interior);”

And also

“Section 28. When Applicable to Indians and Eskimos. This Act shall not inure to the benefit of any Indian or Eskimo resident of the Territory who is provided for by the Department of the Interior out of the funds of the Treasury of the United States or to any ward of the Government of the United States. (Section 8 Chapter 46, 1923)”.

by reason of which sections of the said laws, applications for relief by Indians otherwise qualified are denied and the said Indians are objects of discrimination, and are deprived of the benefits of the said laws and appropriations made thereunder, solely because of race, all contrary to Sections 41 and 42 of Title 8, United States Code; that said items so alleged in the foregoing paragraph of this complaint and Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were and now are ultra vires and

void because the same were attempted to be enacted and passed by said Legislature in violation of the Acts of Congress passed prior thereto, and because the said items and said Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, were passed without any power so to do, and in violation of the said Organic Act of August 24, 1912, so creating the said Legislature of Alaska and conferring legislative power thereon, and the defendant herein as Treasurer of the Territory of Alaska has no power or authority to pay said items in the manner prescribed by said Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, or in any other manner, from the monies and public funds belonging to the Territory of Alaska in his possession as Such Treasurer, because the said Acts containing the said items, and said Chapter 65, Session Laws of Alaska, 1929, as amended by Chapter 89, Session Laws of Alaska, 1933, so far as the said items are concerned, were and are to that extent ultra vires and in violation of the laws of the United States and the Constitution thereof and the said [4] Organic Act creating the Legislature and conferring legislative power thereon.

V.

That the said items complained of in paragraph III of this complaint will be paid out by the defendant illegally and in violation of the laws and Constitution of the United States, without this court

shall prevent the defendant from so doing by its power of injunction; that said sums will thereby be lost from the public funds so in possession of defendant as such Territorial Treasurer and their illegal and unlawful payment for unlawful and unauthorized purposes will greatly increase the taxes which this plaintiff and other taxpayers in Alaska are obliged to pay to maintain the government, to their great loss and damage; that plaintiff has not, and other taxpayers similarly situated in Alaska have not, any plain, speedy or other adequate remedy at law to prevent the unauthorized and unlawful expenditure and loss of said public funds so paid into the Territorial Treasury of Alaska for the maintenance of government.

WHEREFORE plaintiff prays this court to render judgment herein for the plaintiff and to perpetually enjoin the defendant, Walstein G. Smith, as such Territorial Treasurer of Alaska, from disbursing or paying out of the monies and public funds so in his possession as such Treasurer any of the said sums so mentioned and described in this complaint for any of the uses and purposes therein set forth, under the authority of said Acts of the Territory, and every one of the said items be declared and is ultra vires and void for being enacted in violation of the laws of the United States and the Constitution thereof; and especially the said Organic Act of August 24, 1912, creating the Legislature and conferring legislative power, and further decree that the appropriations of said sums so complained of in paragraph III of this complaint are [5] ultra vires

and void as being unauthorized by any existing law or at all.

That the court grant in its said final judgment and decree lawful and proper to effectually enjoin and prevent the payment of said sums of money complained of by plaintiff in this his complaint, by said Treasurer for and on said illegal and void appropriations, and for general relief, and for his costs and disbursements in *hitis* action.

WILLIAM L. PAUL
Attorney for plaintiff. [6]

United States of America
Territory of Alaska—ss

William L. Paul, being first duly sworn, deposes and says that he is the attorney for plaintiff in the above entitled action, that he makes this verification because plaintiff is not at the place where verification is made, Juneau, Alaska; that he has read the hereto attached amended complaint, that each and every materialy fact is within his personal knowledge, that the same is true.

WILLIAM L. PAUL

Subscribed and sworn to before me this 10th day of July, 1934.

[Seal]

FRANK H. FOSTER

Notary Public for Alaska

My commission expires August 8, 1935.

Copy received July 10th, 1934.

JAS. S. TRUITT

Attorney General for Alaska.

[Endorsed]: Filed Jul 10 1934 [7]

[Title of Court and Cause.]

DEFENDANT DEMURRER TO PLAINTIFFS
AMENDED COMPLAINT

Comes now the said above named Defendant, Walstein G. Smith, as Territorial Treasurer of the Territory of Alaska, by Jas. S. Truitt, Attorney General for Alaska, and demurs to the said above named Plaintiffs Amended Complaint, in said above entitled Court and alleged cause of Action, and for ground of Demurrer alleges:

First: That the Court has no jurisdiction of the person of the Defendant or the subject of the action

Second—That the Territory of Alaska, the real party in interest against which the Injunction is sought, cannot be sued without its consent;

Third—That the Plaintiff has no legal capacity to sue;

Fourth—That the Complaint does not state facts sufficient to constitute a cause of action or to entitle the said Plaintiff to the relief, or any relief therein demanded;

WHEREFORE Defendant demurs to the whole Complaint in said alleged cause of action and prays that the Plaintiff take nothing herein and that the Defendant be awarded judgment for his costs and disbursements herein and on account hereof expended.

JAS. S. TRUITT

Attorney for the Defendant

Service of the above and foregoing Demurrer accepted and receipt of copy thereof acknowledged this the 12 day of July 1934.

WM. L. PAUL

Attorney for Plaintiff

By: WM. L. PAUL JR.

[Endorsed]: Filed Jul 14 1934 [8]

[Title of Court and Cause.]

ORDER SUSTAINING DEFENDANTS DEMURRER TO PLAINTIFFS AMENDED COMPLAINT

This action having been brought to trial on the issue of law joined herein, after hearing Jas. S. Truitt, Attorney General of Alaska, in support of the Demurrer and William L. Paul, in opposition:

IT IS ORDERED, ADJUDGED and DECREED, that the said Demurrer be, and the same is hereby, sustained, but with leave to the plaintiff to plead over within ten days.

Dated in open Court this the 27th day of November, 1934.

GEO. F. ALEXANDER

Judge of the District Court First Division

Entered Court Journal No 9 page 238

[Endorsed]: Filed Nov. 27 1934 [9]

In the District Court for the Territory of Alaska
Division Number One, At Juneau

No. 3618 A

CHARLES DEMMERT, for himself and all other
Tax-payers similarly situated,

Plaintiff,

vs

WALSTEIN G. SMITH, as Territorial Treasurer
of the Territory of Alaska,

Defendant

**JUDGMENT FOR DEFENDANT, AFTER
ORDER SUSTAINING DEMURRER.**

It appearing to the Court that an Order was made and entered in this action, on the 24th day of November, 1934, sustaining the Defendants demurrer to the said Plaintiffs amended Complaint, with leave to the said Plaintiff to plead over within ten days thereafter, and,

It further appearing to the Court that more than ten days have elapsed since the making and entering of said Order, sustaining said demurrer and the said Plaintiff having wholly failed and neglected to plead over in said Court and cause, as by said order allowed; therefore,

On motion of Jas. S. Truitt, attorney for the said defendant,

IT IS ORDERED AND ADJUDGED, that the amended complaint herein be, and the same is hereby dismissed, and that the defendant have and

recover his costs of the said plaintiff in the sum of \$8.00, as taxed by the Clerk of this Court.

Done and dated in open Court this the 12 day of December, 1934.

GEO. F. ALEXANDER
Judge of the District Court.

Entered Court Journal No. 9 Page 267

[Endorsed]: Filed Dec 12 1934. [10]

[Title of Court and Cause.]

PETITION FOR LEAVE TO APPEAL

To the Honorable Geo. F. Alexander, Judge of the District Court, for the Territory of Alaska, Division number one, at Juneau;

The above named CHARLES DEMMERT, conceiving himself aggrieved by the Judgment and decree made and entered in the above entitled Court on December 12, 1934, whereby it was ordered, adjudged and decreed that this cause be dismissed, and that defendant recover his costs and disbursements herein from the Plaintiff,

Does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and judgment for the reasons set forth in the assignment of errors, and prays that his petition for said appeal be allowed, and that a transcript of the record, duly authenticated, may be sent to the United States Circuit Court of Appeals for the

Ninth Circuit at San Francisco, California, and that a citation may issue as provided by law.

Dated at Juneau, Alaska, this 3d day of January, 1935.

WILLIAM L. PAUL

Attorney for Plaintiff

ORDER GRANTING PETITION FOR APPEAL

The foregoing petition for appeal is granted, and the claim of appeal made therein is allowed, and the bond on appeal is fixed in the sum of \$250.00.

Dated at Juneau, Alaska, the 3rd day of January, 1935.

GEO. F. ALEXANDER

Judge.

Copy received January 3, 1935

JAS. S. TRUITT,

Attorney for Defendant

Entered Court Journal No. 9 Page 287.

[Endorsed]: Filed Jan 3 1935 [11]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Charles Demmert, plaintiff in the above-entitled cause, assigns the following errors made by the trial court in the rendition and entry of the judgment herein and the order sustaining the demurrer of

defendant to plaintiff's amended complaint upon which the said plaintiff and appellant will rely in the United States Circuit Court of Appeals for the Ninth Circuit for a reversal of said judgment and said order sustaining the demurrer, as follows, to wit:

I.

The court erred in making its order sustaining the demurrer to plaintiff's amended complaint, which said order (omitting title) is in words and figures as follows:

“This action having been brought to trial on the issue of law joined herein, after hearing Jas. S. Truitt, Attorney General of Alaska, in support of the Demurrer and William L. Paul, in opposition:

“IT IS ORDERED, ADJUDGED AND DECREED, that the said Demurrer be, and the same is hereby, sustained, but with leave to the plaintiff to plead over within ten days.”

“Dated in open court this the 24th day of November, 1934.

“GEO. F. ALEXANDER

“Judge of the District Court First Division”

II.

The court erred in making and entering herein its judgment for Defendant, after Order sustaining

Demurrer, which said judgment (omitting title) is in words and figures as follows, to wit: [12]

“It appearing to the Court that an Order was made and entered in this action, on the 24th day of November, 1934, sustaining the Defendants demurrer to the said Plaintiff’s amended Complaint, with leave to the said Plaintiff to plead over within ten days thereafter, and,

“It further appearing to the Court that more than ten days have elapsed since the making and entering of said Order, sustaining said demurrer and the said Plaintiff having wholly failed and neglected to plead over in said Court and cause, as by said order allowed; therefore,

“On motion of Jas. S. Truitt, attorney for the said defendant,

“IT IS ORDERED AND ADJUDGED, that the amended complaint herein be, and the same is hereby dismissed, and that the defendant have and recover his costs of the said plaintiff in the sum of \$..... as taxed by the Clerk of this Court.

“Done and dated in open Court this 12th day of December, 1934.

“GEO. F. ALEXANDER,

“Judge of the District Court”.

WHEREFORE the plaintiff prays that on account of the errors hereinbefore mentioned and others manifest of record herein, the order allowing

the demurrer and the judgment of the District Court of the District of Alaska, Division Number One, in this cause be reversed and the cause remanded with instructions to enter judgment and decree in favor of the plaintiff herein.

WILLIAM L. PAUL

Attorney for Plaintiff

Copy received this 3 day of January, 1935.

JAS. S. TRUITT

Attorney for Defendant

[Endorsed]: Filed Jan. 3, 1935 [13]

[Title of Court and Cause.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Charles Demmert, Plaintiff-appellant herein, as principal, and W. J. B. McAuliffe and Jake Cropley, as sureties, both residents of the Territory of Alaska, Division Number One, are held and firmly bound unto the above named Walstein G. Smith, as Treasurer of the Territory of Alaska, defendant-appellee, in the sum of \$250.00, to be paid to the said defendant-appellee, for the payment of which sum well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 7th day of January, 1935.

WHEREAS, the above named Charles Demmert has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree rendered in the above entitled suit by the District Court for the Territory of Alaska, Division Number One, at Juneau, on January 3rd, 1935.

NOW, THEREFORE, the condition of this obligation is such that if the above named Charles Demmert shall prosecute his said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void, otherwise the same shall be in full force and effect.

CHARLES DEMMERT

Principal

WILLIAM L. PAUL

His attorney

W. J. B. McAULIFFE

Surety

JAKE CROPLEY

Surety [14]

United States of America

Territory of Alaska—ss

We, the undersigned, W. J. B. McAuliffe and Jake Cropley, whose names are subscribed to the within bond as sureties thereon, being first severally duly sworn, depose and say:

That we are both residents of the Territory of Alaska, Division Number One, and that neither of

us is an attorney nor counsellor-at-law, clerk of any court nor other officer of any court, and that we are each worth the sum of \$250.00 over and above all our just debts and liabilities, exclusive of property exempt from execution.

W. J. B. McAULIFFE
JAKE CROPLEY

Subscribed and sworn to before me this 7th day of January, 1935.

[Seal]

ALBERT WHITE
Notary Public for Alaska

My Commission expires March 28, 1937

Approved this 9th day of January, 1935.

GEO. F. ALEXANDER
Judge

[Endorsed]: Filed Jan 9 1935 [15]

[Title of Court and Cause.]

CITATION ON APPEAL

United States of America—ss

To Walstein G. Smith, as Treasurer of the Territory of Alaska

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, within thirty days from and after this date, pursuant to an appeal filed in the

Clerk's Office of the District Court for the Territory of Alaska, Division Number One, at Juneau, in the above entitled cause, wherein Charles Demmert, the appellant herein was plaintiff and Walstein G. Smith, as Treasurer of the Territory of Alaska, appellee herein, was the defendant, to show cause, if any there be, why the judgment and decree entered in said cause of Charles Demmert, Plaintiff vs Walstein G. Smith, as Treasurer of the Territory of Alaska, Defendant, on December 12, 1934, and referred to in the petition for an appeal filed in said cause, which said appeal was, by order of the Court allowed, as prayed for, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, this 9 day of January, in the year of our Lord one thousand nine hundred and thirty five.

[Seal]

GEO. F. ALEXANDER

Judge of the District Court, Territory of
Alaska, Division Number One.

Attest:

ROBERT E. COUGHLIN

Clerk

Service admitted this 9 day of January, 1935.

VELLA MOEHRING

Clerk for Attorney for Defendant-Appellee

Entered Court Journal No. 9 Page 291

[Endorsed]: Filed Jan 9 1935 [16]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court for the Territory
of Alaska, Division Number one;

You will please prepare a transcript of the record of the above entitled cause and transmit the same to the Clerk of the Circuit Court of Appeals for the Ninth Circuit to be used in the appeal herein, said transcript to include the following;

1. Amended complaint;
2. Defendant's demurrer to Plaintiff's amended complaint;
3. Order sustaining defendant's demurrer to Plaintiff's amended complaint;
4. Judgment for defendant after order sustaining demurrer and dismissing the action.
5. Petition for appeal and order allowing same;
6. Assignments of error;
7. Bond on appeal;
8. Citation.
9. This praecipe.

All of which are to be prepared with a view to transmitting the same to the United States Circuit Court of Appeals *for the Ninth Circuit Court of Appeals* for the Ninth Circuit in connection with the appeal herein within the time limited by the rules of that court, and when so prepared you will transmit this record to the Clerk of the United States

Circuit Court of Appeals for the Ninth Circuit at
San Francisco, California.

WILLIAM L. PAUL

Attorney for Plaintiff

Copy received this 9 day of January, 1935

VELLA MOEHRING

Clerk for Attorney for Defendant

[Endorsed]: Filed Jan 9 1935 [17]

In the District Court for the District of Alaska,
Division No. 1, at Juneau Alaska

United States of America,
District of Alaska,
Division No. 1.—ss:

CERTIFICATE.

I, ROBERT E. COUGHLIN, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 18 pages of typewritten matter, numbered from 1 to 18, both inclusive, constitute a full, true and complete copy, and the whole thereof, as per the praecipe of the plaintiff-appellant on file herein and made a part hereof in a cause wherein CHARLES DEMMERT, For himself and all other tax-payers similarly situated is Appellant, and WALSTEIN G. SMITH, as Territorial Treasurer of the Territory of Alaska is Appellee, case No. 3618-A, as the same appears of record and on file in my office, and that the said record is by virtue

of an APPEAL and Citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office and the cost of preparation, examination and certificate amounting to Seven Dollars and forty cents (\$7.40) has been paid to me by the plaintiff-appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 16th day of February, 1935

[Seal]

ROBERT E. COUGHLIN
Clerk.

By VENETIA PUGH
Deputy. [18]

[Endorsed]: No. 7781. United States Circuit Court of Appeals for the Ninth Circuit. Charles Demmert, for himself and all other taxpayers similarly situated, Appellant, vs. Walstein G. Smith, as Territorial Treasurer of the Territory of Alaska, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One, at Juneau.

Filed February 26, 1935.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

